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Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 75-1911.

ROBERT F. AHEARN, ET AL.,
APPELLANTS,
v.
ROBERT J. DI GRAZIA,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
THREE JUDGE COURT.

Motion to Dismiss or Affirm.

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The Appellee moves the Court to dismiss or affirm on the grounds that the appeal is not within the jurisdiction of this Court and that the question presented is so unsubstantial as not to need further argument.

Questions Presented.

1. Whether the Massachusetts Civil Service administrative procedures which provide for review of the imposition of extra punishment duty and a remedy for obtaining back pay for performance of such duties, constitute an adequate remedy at law.

2. Whether the imposition of extra punishment duty constitutes irreparable harm, in light of the fact that employees who perform such duties have an available remedy for receiving back pay.

3. Whether a State Civil Service disciplinary statute which only applies to police and firemen creates a suspect classification or interferes with a fundamental federal right so as to require the application of strict scrutiny equal protection analysis.

4. Whether a Civil Service disciplinary statute which applies only to police and firemen bears a rational relation to a legitimate public purpose.

Statement of the Case.

The appellants are four Boston police officers who were ordered to work extra duty without pay pursuant to Mass. Gen. Laws c. 31, § 43(*g*). In accordance with that statute the appellee, the Police Commissioner of the City of Boston, notified the appellants of a hearing on the charges and specifications filed against them. That notice informed the appellants that he appellee was considering imposing punishment duty. After a hearing the appellee notified the appellants that they were ordered to work punishment duty.

The appellants filed a civil action in the United States District Court for the District of Massachusetts requesting the convening of a Three-Judge Court to hear a challenge to the constitutionality of Mass. Gen. Laws c. 31, § 43(*g*). On January 9, 1976 a single judge ordered a Three Judge Court to convene and issued a temporary restraining order to prevent the imposition of punishment duty. The Three Judge Court issued a memorandum decision on May 6, 1976 dismissing the appellants' constitutional challenge to Mass.

Gen. Laws c. 31, § 43(*g*) and vacating the temporary restraining order.

Argument.

I. The Court Below Lacked Jurisdiction because There Is No Basis for Issuing an Injunction.

This court does not have jurisdiction unless the Three Judge Court below had a basis upon which to issue an injunction against the enforcement of the State statute. The only necessity for forming such a court is to issue an injunction. 28 U.S.C. § 2281. In this case no injunction could issue since (i) the appellants cannot demonstrate the existence of irreparable harm and (ii) the appellants have an adequate and available administrative remedy at law. See *Huffman* v. *Pursue, Ltd.*, 43 U.S.L.W. 4379, 95 S. Ct. 1200 (1975); *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 95 S. Ct. 2561 (1975). See also *American Federation of Labor* v. *Watson*, 327 U.S. 582 (1946).

A. The Appellants have Not Demonstrated the Existence of Irreparable Injury because They Will Receive Payment for the Punishment Duty If Their Appeals Are Successful.

The work that the appellants will be required to perform is punishment only because they will not be receiving pay for that work. It is not because the work is any more arduous, dangerous or fatiguing than that which he must customarily perform as a patrolman. The punishment duty provisions of the Civil Service laws, Mass. Gen. Laws c. 31, § 43(*g*), may not be interpreted as permitting the police commissioner to order a patrolman to perform work outside of the Civil Service job description for patrolmen.

Also, the rules and regulations of the Boston Police Department governing a punishment duty provide that such duty must be assigned so that each appellant "shall not suffer undue fatigue . . . and he shall not be compelled to do more than seven consecutive hours of punishment duty at any time, or more than fourteen hours in four consecutive days, or more than twenty-one hours in seven consecutive days (nor) . . . within two hours before or after a tour of regular or special duty." See Rule 54 § 12, included herein as Appendix A. In addition, the mere fact that the appellants have to work in excess of their regularly scheduled tours of duty may not be construed as punishment because the Collective Bargaining Contract between the Boston Police Patrolmen's Association and the City of Boston permits the police commissioner to order a patrolman to perform compulsory overtime duty. See Appendix B. Therefore, the only aspect of punishment for this duty is the fact that it will be performed without pay. Should appellants' appeal to the Civil Service Commission, provided for in Mass. Gen. Laws c. 31, § 43(*b*) or judicial review, provided for in Mass. Gen. Laws c. 31, § 43(*d*), prove successful, the harm to the appellants is clearly repairable in the future simply by paying appellants for the work they performed. Therefore, the appellants have not and can not demonstrate the existence of irreparable injury which is a necessary element for the issuance of an injunction under the common law.

In addition, this Court has recently ruled that a discharge will not form the basis of irreparable injury. *Sampson* v. *Murray,* 415 U.S. 61, 92, 94 S. Ct. 937, 953 (1974). Clearly, punishment duty is less injurious than a discharge and may not form a basis for finding or irreparable injury.

Punishment duty is specifically authorized by statute, Mass. Gen. Laws c. 31, § 43(*g*). The imposition of punish-

ment duty has been affirmed in several decisions of the Supreme Judicial Court of Massachusetts. *Haywood* v. *Municipal Court of City of Boston,* 359 Mass. 760, 271 N.E. 2d 591 (1971). *Costa* v. *District Court of Eastern Essex,* 305 Mass. 85, 25 N.E. 2d 172 (1940). Although the issue presented in each of those cases was limited to the scope of review permitted by the courts, the Supreme Judicial Court of Massachusetts did not even question the validity of imposing such duty.

B. The Court does Not have Jurisdiction because the Appellants have an Adequate Administrative and Judicial Remedy Afforded by the Civil Service Laws.

Appellants have appealed the order that they work extra duty without pay to the Massachusetts Civil Service Commission, where their case is currently pending. In *Soldevila* v. *Secretary of Agriculture,* 512 F. 2d 427, 430 (1st Cir. 1975), the court stated:

> "The strong policy against enjoining incomplete agency actions, which is reinforced by the equity policy against enforcing personal service contracts and the disruptive effect of granting temporary relief in such cases, requires an extraordinary strong showing of irreparable harm to warrant a preliminary injunction. *Sampson* v. *Murray,* 415 U.S. 61 . . . (1974)."

The plaintiff may nor circumvent or supplement the remedies afforded him by G.L. c. 31. Under Chapter 31 the plaintiff is afforded three ways of appealing a decision to impose discipline: (1) request a hearing before the Massachusetts Civil Service Commission pursuant to § 43(*b*); (2) file a complaint with the Commission alleging procedural violations pursuant to the second paragraph of Mass. Gen. Laws c. 31, § 46A; or (3) file a complaint in

the Massachusetts Supreme Judicial Court or the Superior Court alleging procedural irregularities pursuant to the first paragraph of § 46A. These are the only remedies available to the plaintiff; see *Police Commissioner of Boston* v. *Ciccolo,* 356 Mass. 555, 254 N.E. 2d 429 (1969). The Massachusetts Supreme Judicial Court has repeatedly ruled that an employee who has been disciplined is required to follow the statutory scheme and may not file a complaint for an injunction, mandamus or declaratory judgment. *Brouillette* v. *Worcester,* Mass. Adv. Sh. (1974) 183, 306 N.E. 2d 252. *Bergeron* v. *Superintendent, Fernald State School,* 353 Mass. 331, 231 N.E. 2d, 379 (1967). This doctrine has been uniformly applied in analogous situations in which a plaintiff has an administrative remedy. See *East Chop Tennis Club* v. *Massachusetts Committee Against Discrimination,* Mass. Adv. Sh. (1973) 1611, 305 N.E. 2d 507.

Numerous federal decisions have held that a plaintiff may not seek federal judicial relief until the available and adequate state remedies have been exhausted. For example, in *Burks* v. *Perk,* 470 F. 2d 163 (6th Cir. 1972), *cert. denied* 412 U.S. 905 (1973), the court held that a civil servant who had an adequate judicial remedy under state law could not seek federal relief. The First Circuit has also held that employees may not seek federal relief until the state proceedings are "final." See *Raper* v. *Lucey,* 488 F. 2d 748, 751 n.3 (1st Cir. 1973), construing *Beattie* v. *Roberts,* 436 F. 2d 747, 748-749 (1st Cir. 1971). In this case the appellants have a remedy under the Civil Service laws of Massachusetts, Mass. Gen. Laws c. 31 §§ 43 *et seq.* Those remedies are established to protect the statutorily protected tenure of public employees. The appellants must fully exhaust any rights they have under Massachusetts law prior to seeking relief from the federal court.

II. The Statute does Not Deny the Appellants Equal Protection because the Statute Bears a Rational Relationship to Policemens' Jobs.

This court recently reaffirmed that equal protection analysis requires strict scrutiny only when the statutory classificaion "interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *Massachusetts Board of Retirement* v. *Murgia* 44 U.S.L.W. 5077, 96 S. Ct. 2562, 2566 (1976). In addition, the *Murgia* decision specifically held that governmental employment is not a fundamental right. See also *Bishop* v. *Wood,* 44 U.S. 4820, 96 S. Ct. 2074 (1976). Police officers and firemen, the class of governmental employees to whom the statute applies, do not constitute an inherently suspect class such as "alienage," "race" or "ancestry." *Massachusetts Board of Retirement* v. *Murgia,* 96 S. Ct. at 2566 n.4.

> "[T]he class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 28, 93 S. Ct. 1278, 1294 (1973).

The constitutionality of Mass. Gen. Laws c. 31, § 43(*g*), must be determined in light of the presumptive validity of statutes promoting aims within the State's police power. "[T]he question is not . . . whether the State can 'establish' a 'genuine public need' for the specific regulation. It is whether respondent can demonstrate that there is no rational connection between the regulation, based as it is on petitioner's method of organizing its police force, and the safety of persons and property." *Kelley* v. *Johnson,*

44 U.S.L.W. 4469 96 S. Ct. 1440, 1446 (1976) (*sub nom. Barry* v. *Dwen*). The Three Judge Court properly applied the rationality standard in holding that Mass. Gen. Laws c. 31 § 43(*g*), which provides that police officers who engage in misconduct may be ordered to perform extra work without pay, is rationally related to the State's purpose of providing effective means for maintaining well disciplined police forces.

A. *The Singling Out of Police Officers does Not Constitute a Violation of Equal Protection.*

This Court has affirmed the constitutionality of rules, regulations or statutes which single out police officers. In *Detroit Police Officers Association* v. *Detroit,* 405 U.S. 950, 92 S. Ct. 1173 (1972), this Court dismissed for failure to present a substantial federal question an appeal from the Michigan Supreme Court holding that a municipal residency requirement that applied only to police officers was valid. The Michigan Supreme Court opinion stated: "The job of a policeman does have 'naturally distinguishing characteristics' from all other city employees." *Detroit Police Officers Association* v. *Detroit,* 385 Mich. 519, 190 N.W. 2d 97 (1971). Recently this Court reaffirmed that statutes which single out police officers are not irrational and do not violate the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment. *McCarthy* v. *Philadelphia Civil Service Commission,* U.S. , 96 S. Ct. 1154 (1976). In *Kelly* v. *Johnson, supra,* the Court upheld a departmental rule regulating the hair length of police officers. In *Murgia, supra,* the Court upheld the constitutionality of a Massachusetts statute providing a mandatory retirement age for State police officers — although that age was lower than the mandatory retirement age for other Massachusetts employees, and lower than the statutorily

provided mandatory retirement ages for State police officers in other states.

The Massachusetts Supreme Judicial Court has also affirmed the constitutionality of rules, regulations or statutes which single out police officers. In *Boston Police Patrolmens Association, Inc.* v. *Boston,* Mass. Adv. Sh. (1975) 979, 987, 326 N.E. 2d 314, 319, the court affirmed the validity of a rule requiring police officers who are candidates for public office to take a leave of absence. That court held:

> "So far as it is contended that there is a denial of equal protection of laws because the rule does not extend beyond the police department, the contention borders on the frivolous."

B. *Since a Police Force Is a Highly Sensitive and Disciplined Organization the Police Commissioner must Exercise Greater Control over Its Members Than Public Employers Exercise over Non-Police Employees.*

It is necessary that a police department be a highly disciplined force. In *Stradley* v. *Andersen,* 478 F. 2d 188, 190 (8th Cir. 1973), the court stated:

> "Traditionally, the policeman has been a highly trained officer who is entrusted with a responsible and oftentimes dangerous role as a public servant. His work habits on active duty require disciplined conduct, regimentation and frequent strict adherence to regulation and authorized detail. His job is often a delicate and difficult task to lawfully act against those who are sometimes unwilling to recognize any rules or ethics. It is essential that a policeman's training be such that he be taught to obey strict disciplinary procedures and rules in order to lend practical assurance that he will follow command and not abuse his awesome authority."

The legislature has empowered the Police Commissioner to use a variety of sanctions, including reprimands, suspensions, demotions, punishment duty and discharge, to insure that the police department is a well disciplined, effectively functioning body.

C. *The Interest and Right of the Government in Providing a Disciplined Police Force Is to Be Balanced against the Rights of Individual Police Officers.*

The extent of control which any public employer may exercise over private acts of a public employee involves a balancing test. In *Pickering* v. *Board of Education,* 391 U.S. 563, 568 (1968), the Court stated:

> " '[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.' *Keyishian* v. *Board of Regents, supra,* at 605-606 [17 L. Ed. 2d at 642]. At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulations of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and interest of the State, as an employer, in promoting the efficiency of the public service it performs through its employees."

Therefore, even when non-police employees are exercising the fundamental liberties of free speech, the court will balance that exercise against the interest of the employer.

In *Kelley* v. *Johnson, supra,* after noting recent decisions upholding substantial restrictions on the First Amendment rights of federal and state employees, the Court stated:

> "If such state regulations may survive challenges based on the explicit language of the First Amendment, there is surely even more room for restrictive regulation of state employees where the claim implicates only the more general contours of the substantive liberty interest protected by the Fourteenth Amendment." 44 U.S.L.W. 4469, 96 S. Ct. 1440, 1445 (1976).

The specialized nature of police work is also a circumstance to be taken into account. In *Muller* v. *Conlisk,* 429 F. 2d 901, 904 (7th Cir. 1970), the court indicated that the *Pickering* balancing test is applicable to police departments, and the fact that policemen are involved may "influence the balance which *Pickering* says must be struck in each case."

The justification for imposing punishment duty upon police officers is the need for a highly trained and disciplined force. Therefore, there is a public need for such a disciplinary tool. On the other side of the balancing test, the imposition of punishment duty does not impose an undue burden on the police officers. They have a full administrative review which, if successful, will adequately protect them. Also, they cannot be required to perform any onerous duties beyond the scope of their employment as police officers. In addition, they will only work a few hours of this duty per week.

Conclusion.

If the appellants had been suspended for two weeks, they and their families would have lost approximately five hundred dollars in pay. This loss would have been immediate, and the appellants would have to successfully appeal that suspension to the Civil Service Commission and the courts in order to receive those lost wages. It is extremely doubtful that the appellants would have sought an injunction against

what is recognized to be the usual and ordinary procedure under c. 31. However, the appellants will not suffer such a loss of pay, but merely must work several extra hours a week. The decision of the police commissioner to impose extra punishment duty prevented the appellants or their families from suffering an immediate and severe financial loss. If the punishment duty is enjoined, the police commissioner will have little alternative but to utilize suspensions rather than extra punishment duty even in situations in which it would be more equitable and fair to have imposed punishment duty.

Respectfully submitted,

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Appendix A.

Rule 54 of the Rules and Regulations of the Boston Police Department.

12. Punishment duty for a member of the department shall be performed under the direction of his commanding officer. Whenever any portion of the punishment duty as ordered has been performed, the officer assigning it shall report to the superintendent in the next daily mail the name of the man, the number of hours and the character of the work done; and when the sentence has been completed he shall so certify in such form as the superintendent shall prescribe. Punishment duty shall be in addition to all regular and extra duty, and no man under punishment shall be on that account relieved of any regular or extra work which he otherwise would have done. Punishment duty must be useful, whether as an addition to the effective strength, or as a relief for other men who have worked hard and faithfully. Commanding officers are warned to be especially careful that no suggestion of favoritism shall attach to their assignments or reliefs. Punishment duty must be so assigned that the man under punishment shall not suffer undue fatigue or be otherwise unfitted for his regular or extra work; and except with his written consent, he shall not be compelled to do more than seven consecutive hours of punishment duty at any time, or more than fourteen hours in four consecutive days, or more than twenty-one hours in seven consecutive days. Neither shall he be compelled, without his written consent, to perform such duty within two hours before or after a tour of regular or special duty.

Appendix B.

COLLECTIVE BARGAINING CONTRACT.

Section 2. Scheduling of Overtime. In emergencies or as the needs of the service require, employees may be required to perform overtime work. Employees shall be given as much advance notice as possible of overtime work. Scheduled overtime shall be posted and distributed to all employees on an equitable and fair basis, in the same manner as set forth in Article XII hereof. Employees, other than those required to work beyond their normal tour of duty due to the exigencies of their workday (such as a late ambulance run, etc.), shall have the option of declining offered overtime, but in the event that sufficient personnel do not accept such offered overtime on a voluntary basis, or in the event of emergency situations where time is of the essence in executing the overtime job, such additional personnel as are deemed necessary by the City may be required to work overtime on an assigned basis. All employees shall be afforded the opportunity to accept overtime service, but there shall be no discrimination against any employee who declines to work overtime on a voluntary basis. The Department will seek to avoid assigning overtime (as contracted with voluntary overtime) to employees working a "short day", so called, on days off, or working with night platoons who are required to attend court, etc. (see Article X) between their tours of duty or on days off, so that such employees may be afforded every opportunity for required rest or to attend to their personal business before and after working hours or on a day off.

Appendix C.

MASS. GEN. LAWS c. 31, § 43(*g*).

(*g*) Punishment duty shall not be imposed without cause upon any police officer or fire fighter subject to this chapter. A police officer or fire fighter upon whom punishment duty is imposed shall, within twenty-four hours of the imposition of such punishment duty, be given a copy of this section and of section forty-five, together with a written notice stating the specific reason for the imposition of such punishment duty and the duration thereof and informing him that he may, within forty-eight hours of receipt of such notice, request in writing a hearing by the appointing authority, and if he so requests he shall be given a hearing within five days of receipt of such request by the appointing authority. A copy of the notice of imposition of punishment duty shall be forwarded forthwith to the personnel administrator. Whenever such hearing is given, the appointing authority shall give the police officer or fire fighter upon whom the punishment duty is imposed a written notice of his finding within two days after the hearing. If, after such hearing, the appointing authority finds no just cause exists for the imposition of punishment duty, such punishment duty shall be deemed not to have been imposed; if, after such hearing, the appointing authority finds that just cause does exist for the imposition of punishment duty, the police officer or fire fighter upon whom the punishment duty is imposed may appeal to the commission as provided in paragraph (*b*), and he or the appointing authority shall be entitled to judicial review of the action taken by the commission as provided in paragraph (*d*). The provisions of paragraph (*c*) shall apply to all hearings under this paragraph. Notice of any action taken by the appointing authority under this paragraph shall be forwarded forthwith to the personnel administrator.